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ABSTRACT

A compelling argument can be made for the "public forum doctrine," which states that public broadcasting stations licensed to government bodies have a greater obligation than commercial stations under the First Amendment to transcend political and personal biases in making programing decisions. It is also equally important that government officials, having delegated editorial authority to public broadcast programers, do not attempt to arbitrarily interfere with the programer's decisions. In the latter case, the courts may be able to provide relief to station officials whose authority is usurped. Examples of court cases that extend these arguments include the Supreme Court's 1973 decision in "CBS v. Democratic National Committee," which delineated what might be considered as a public forum, and the court litigation related to a 1980 broadcast of a controversial "docudrama" on public television ("Death of a Princess," the story of the execution of a Saudi Arabian princess and her lover). However, imposing the judgments of the courts or the Federal Communications Commission (FCC) on all of a public station's programing decisions would be antithetical to numerous Supreme Court decisions that have affirmed the right of all broadcasters to retain broad editorial discretion. Thus, a non-statutory approach must be established in order to encourage public stations to base programing decisions on public interest rather than political considerations. A citizens' panel is one possible solution to the dilemma. (RL)

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Public Broadcasting and the Public Forum Doctrine

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The passage of the Public Broadcasting Act of 1967 was hailed as a great victory for noncommercial television and radio stations. Plagued by a lack of funding, quality programming and audience, the stations felt that the federal government's involvement in noncommercial broadcasting was essential if the system was to flourish. And without question the federal monies provided to noncommercial stations in the past fourteen years have enabled those stations to become a mature and relevant voice in their communities. However, along with providing funding to public stations, Congress also placed constraints on the expressive rights of public broadcasters. The Public Broadcasting Act established a proscription against editorializing and also mandated the newly created Corporation for Public Broadcasting to maintain strict objectivity and balance in each program or series it funded. These provisions stood in contrast to the Federal Communications Commission's regulatory framework which encouraged licensees to editorialize and examined a broadcaster's entire schedule in determining questions of fairness and balance.

In applying these restrictions on public broadcasting's First Amendment freedom some legislators were motivated by honest concerns about the system being utilized as a conduit for government propaganda, while others were guided by political self-interest. Neither reason is sufficient to justify a dimunition of public broadcasting's expressive rights. A review of the case law and FCC decisions in this area clearly indicates there is little constitutional justification for the government restricting the First Amendment rights of public broadcasters. A 1978 federal court of appeals decision unambiguously stated

that public broadcasting enjoyed the same expressive freedom as its commercial counterpart. Earlier the courts had found that CPB's objectivity and balance requirement was not legally binding, and the FCC and Justice Department had publicly admitted that the editorializing provision was in violation of public broadcasters' First Amendment rights. However, determining that provisions such as the editorializing restriction are unconstitutional does not necessarily indicate that the public broadcasting-government nexus has no impact on the expressive rights of noncommercial stations, particularly those licensed directly or indirectly to state and local government agencies. It has been aruged that those stations--which comprise the majority of public radio and television outlets--constitute a public forum, and as such have significantly limited editorial discretion compared to commercial licensees. This paper reviews the attempts to apply the public forum doctrine to public broadcasting.

Overview of the Public Forum Doctrine

The public forum doctrine can be traced back to the Supreme Court's 1939 decision in Hague v. CIO. The Court ruled that the public had the right to utilize certain publicly owned facilities for expressive activities:

> Whereever the title to streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The

> privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[1]

In subsequent decisions, the Court indicated that the government could establish narrow and precise regulations regarding use of public forums, such as requiring persons to obtain a license to parade down a public street. However, the Court has emphasized that once a public place is determined to be a public forum, the government cannot limit access to the forum on the basis of what an individual intends to say:

> Government may not grant the use of a forum to people whose view it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and the government must afford all points of view an equal opportunity to be heard.[2]

The goal of the public forum is to ensure that all individuals have the opportunity to participate in the marketplace of ideas. As numerous legal and mass communications scholars have indicated, the expansion of public forums is especially critical in contemporary America, since the majority of the public is denied access to mass communication outlets. As one writer indicated, public forums serve an especially important function for society's disenfranchised:

> Rich, influential and entrenched interests have ready access to the public through their domination and control of the privately owned mass communication media; their wealth, power and influence are ample assurance that their message

> will find a channel to the public ear. On the other hand, the poor and unrepresented are provided with a minimal means of communication to the public ear by the . . . right to a public forum.[3]

Since the Hague decision, the courts have expanded the public forum construct to include public transportation terminals and vehicles, schools, public school newspapers, municipal theaters and other public buildings including welfare offices and the grounds of the state legislature.

Public Forum and Public Broadcasting

The first hint that public broadcasting might be considered as a public forum appeared in the Supreme Court's decision in CBS v. Democratic National Committee. In that decision, the Court rejected the plaintiff's notion that CBS's refusal to accept editorial advertisements urging controversial positions violated their First Amendment rights. However, in a concurring opinion, Justice Douglas admitted that his finding might have been quite different if the case had involved public rather than commercial broadcasting:

> (The Corporation for Public Broadcasting) is a non-profit organization and by the terms of (the authorizing statute) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment. If these cases involved the Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper. . . .

> The government as owner and manager would not, as I see it, be free to pick and choose some items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Policies, ideological slants, rightist or leftist tendencies could play no part in its design of program. . . . More specifically, the programs tendered by the respondents in the present case could not then be turned down.[4]

Justice Stewart also argued that if "the Government (was) really operating the electronic press, it would . . . be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment."[5] He added that if stations were viewed as government actors, they would be compelled to provide access for all individuals wishing to use their facilities. The only regulations which could be established, said Justice Stewart, would be those "time, place and manner" rules which, like laws regulating the use of public parks and streets, would be necessary to maintain the orderly operation of the stations.

Since the majority opinion in CBS v. DNC affirmed the editorial latitude of commercial broadcasters, there was little attention paid to Justices Douglas and Stewart's comments regarding the diminished editorial discretion afforded to stations licensed to government bodies. Indeed, the FCC in 1975 rejected the assertion that New York City, the licensee of noncommercial radio station WNYC, was required to operate the station "in a procedurally fair manner and without regard to the views expressed."[6] Instead, the Commission maintained that the city had the same editorial rights as any commercial broadcasters. Likewise, in a 1979 decision, the FCC dismissed a complaint that the Mississippi

Authority for Educational Television had violated the First Amendment by rejecting programs which some of its audience desired to view. The Commission specifically ruled that the state network did not constitute a public forum, and was thus free to reject or accept programs based on their content or any other criteria it established.

The applicability of the public forum construct to public broadcasting was also rejected by a U.S. District Court in its ruling in Network Project v. CPB. The plaintiffs, a group of New York based media activists, had charged that CPB and PBS had violated their First Amendment rights by censoring and controlling the content of public television programming. The Network Project relied heavily on the Supreme Court's ruling in Southeastern Promotions Ltd. v. Conrad to support its assertion that public television constituted a public forum. In that case, the Court had held that a municipal auditorium could not ban the play Hair since it was a "public forum designed and dedicated to expressive activities."[7] However, the Network Project court, quoting from another federal court decision regarding public funding of the arts, asserted there was a significant difference between a public hall and public television, which justified the latter being afforded broad editorial discretion:

> While it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art," the very definition of which requires an exercise of judgment from case to case. Moreover, money is a more flexible instrument than a public building: an applicant

> may receive varying amounts depending upon his needs and the promise of his work; similarly, the quantity of available funds may vary . . . If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.[8]

The Network Project court added that since CPB had been mandated by Congress to provide funding for high quality programs, both the Corporation and PBS were required to exercise editorial decisions based on content. The court did stress that "(t)his, of course does not give the defendants a free rein to discriminate against certain types of programs or to seek to promote certain messages over others."[9]

Death of a Princess

In the spring of 1980, PBS announced that a docudrama entitled Death of a Princess would air in mid-May. The program was based on the execution of a Saudi Arabian princess and her lover. The Saudi government immediately criticized the proposed program, claiming it offered a distorted view of the Moslem religion and culture. The U.S. State Department, a number of congressmen and Mobil Oil Corporation--one of public television's major corporate underwriters--also indicated their concern over the program's impact on U.S.-Saudi relations.

In the face of the controversy over Death of a Princess, a few public stations including KUHT, licensed to the University of Houston, and the stations of the Alabama Educational Television Network announced their intention not to air the docudrama. The decisions of KUHT and the Alabama ETV Commission were greeted with lawsuits by viewers who contended their First Amendment right to be informed was being violated by the stations.

In response to the suit filed by Gertrude Barnstone, a subscriber to KUHT, U.S. District Court Judge McDonald ordered the station to air Death of a Princess. The Judge said the record indicated that the decision not to air the program had been made by a University of Houston vice president rather than station management. According to a press release issued by the official, his decision had been based on the belief that the docudrama would anger the Saudi government, and thus threaten American interests in the Middle East.

Judge McDonald ruled that it was clearly improper for a state "owned-and-operated" station to base its programming decisions on the "arbitrary" beliefs of government officials.[10] Citing the Supreme Court's decision in Southeastern v. Conrad, the Judge concluded that "the University of Houston in this case lacked the necessary procedural safeguards in failing to provide established guidelines for programming decisions and allowing one official the unbridled discretion to program on the basis of his political beliefs."[11]

Judge McDonald's decision, which came three days before the planned broadcast of Death of a Princess, was vacated by a U.S. Court of Appeals on the day of the broadcast. A petition to reinstate the Judge's decision was filed with Supreme Court Justice Powell, but he denied the application shortly before the broadcast began.

In August 1980, Judge McDonald conducted a three-day bench trial in Barnstone v. University of Houston. The plaintiffs (a second party had joined Ms. Barnstone in the suit) largely relied on Justices Douglas and Brennan's opinions in CBS v. DNC to support their belief that

KUHT constituted a public forum. Decisions regarding the operation of such forums, contended the plaintiffs, must be narrowly drawn, and an utterance cannot be barred "because of its message, its idea, its subject matter, or its content."[12] The plaintiffs concluded that KUHT's decision did not result from such precise guidelines, but was instead inspired by the personal political beliefs of its programmers. Therefore, said the plaintiffs, the station's failure to air Death of a Princess constituted a prior restraint in contravention of the First Amendment.

Ironically, the University of Houston and PBS, which entered the case as a friend of the court, used the Supreme Court's ruling in CBS v. DNC to support their contention that both public and commercial licensees have "both the absolute right and the undelegable responsibility to select the programs to be broadcast."[13] Thus, concluded the University and PBS, "the operation of a broadcast station is fundamentally inconsistent with the concept of a public forum which must be open to all."[14] PBS also asserted that it was irrelevant whether KUHT had chosen not to run Death of a Princess because of the political beliefs of a university administrator. Editorial decisions often comprise political considerations, argued PBS, and furthermore, even if political considerations were not always in the public interest, "the evils of judicial supervision of programming judgments presents a far greater threat than the presence or absence of a misguided programming choice."[15]

In December, Judge McDonald once again ruled in favor of the plaintiffs, and ordered KUHT to air Death of a Princess within thirty days. The Judge ruled that the public forum doctrine embraced any place that was "(1) controlled by the government and (2) appropriate as a place for the communication of views on issues of political and social significance."[16] Judge McDonald concluded "there is no question that KUHT is precisely such a place."[17]

In making that determination, the Court dismissed each of KUHT's arguments why it should not be considered a public forum. KUHT had maintained that being deemed a public forum would reduce the station to common carrier status, and it would thus be forced to provide access to all individuals wishing to use its facilities. Judge McDonald replied that finding a government licensed station to be a public forum did not necessarily also render it a common carrier. However, the Judge provided little indication of how a station could retain any editorial control over its programming without being in violation of its public forum obligations.

The Court also denied the defendant's assertion that before a place could be considered a public forum, it must first be demonstrated that the public had a right of access to the facility. The University had pointed out that a judge's chambers were under state ownership and control, but was obviously not a public forum, since the public had no right of access to the location. In reply, Judge McDonald said the public forum determination did not hinge on the public access question, but rather "(t)he crucial inquiry is whether or not the particular

public facility . . . constitutes an appropriate place for the exercise of First Amendment rights."[18]

Having held that KUHT was a public forum, Judge McDonald then examined whether its decision not to air Death of a Princess constituted an unconstitutional prior restraint. The defendants and PBS had argued there was actually no prior restraint since "freedom of speech presupposes a willing speaker," and quite clearly KUHT was not a "willing speaker" in the Princess affair.[19] The plaintiffs had contended that PBS, rather than KUHT, was the speaker, and the station's refusal to air the docudrama had thus imposed a prior restraint on PBS's First Amendment rights.

Judge McDonald ruled that the producers of Death of a Princess were actually the speakers in the Princess case. The Judge implied that KUHT need not have bought the rights to the program, but having done so, the station could not refuse to air the program because of the views it promulgated. Such an action, concluded Judge McDonald, established a prior restraint.

Judge McDonald used the Supreme Court's decision in CBS v. DNC to support her ruling that it was the First Amendment rights of the plaintiffs, rather than KUHT, which were paramount in the Death of a Princess affair. The Judge concluded that:

> if KUHT-TV and the University of Houston are governmental entities, the First Amendment must apply to their activities. The protection afforded by the Amendment extends not so much to KUHT's editorial decisions as it does to the rights of viewers to be free of governmental control over the content of programs presented to them. The purpose of the First Amendment,

> as with the Bill of Rights in its entirety, is to protect the people from government, not government from the people. . . . The people of this country have a First Amendment right to see and hear without having their sights and sounds subjected to the censorship of those wrapped in the cloak of the state, particularly when those state officials are acting on the basis of their personal, political predilections.[20]

The University of Houston immediately appealed Judge McDonald's ruling to the U.S. Court of Appeals for the Fifth Circuit. The Court granted a stay of the order to air Death of a Princess pending its disposition of the defendants' appeal. That appeal rests in the Court as of this writing.

The lawsuit challenging the Alabama Educational Television Commission's refusal to air Death of a Princess also presently rests in the Court of Appeals. However, in the Alabama case it is the plaintiffs, rather than the defendants, who are seeking to have a lower court decision overturned.

In July 1980, a U.S. District Court in Alabama ruled that the AETC's decision not to broadcast the docudrama did not violate the First Amendment rights of the plaintiffs. The Court held that the Supreme Court's ruling in CBS v. DNC affirmed a broadcaster's freedom to select the programs to be broadcast. The Court also ruled that AETC's decision was justified since it was based on "the concern . . . that the showing of Death of a Princess could expose Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage."[21]

Finally, the Court noted that the petitioners could communicate their unhappiness with the AETC's decision to the FCC. Although the Commission could not compel the AETC to broadcast Death of a Princess, it could consider the AETC's action when the Alabama public television stations' licenses came up for renewal.

Discussion

There is little question public broadcasting stations meet the criterion of the public forum doctrine. First, most public stations are licensed to government agencies, and many of those who are privately licensed receive significant funding from the state and federal government. Second, public stations are typically "used for . . . communicating thoughts between citizens, and discussing public questions."[22] However, there is equally no doubt that applying an unlimited public forum doctrine to public broadcasting would gravely impair the system's ability to operate effectively.

One observer neatly identified the dilemma involved in applying the public forum doctrine to state owned communications media:

> Were the state not permitted to exercise discretion, a paradox would result. An integral component of the operation of most communications media is the exercise of editorial discretion; and the sine qua non of editorial discretion is selective exclusion. Yet the Supreme Court has long held the selective exclusion from public forums may not be made on the basis of content alone. The paradox is that once access is granted to some groups, equal protection compels open access to the state-owned communications facility, but simultaneously prohibits the exercise of editorial discretion. The net result would be that a communications medium which is

> designated a public forum could no longer operate in the same manner which made it desirable as a forum initially: a potentially deleterious consequence for the group seeking access.[23]

The courts have recognized the problems by limiting the application of an unlimited public forum doctrine. In Avins v. Rutgers, a federal court rejected the contention of a law student that his school's law review must accept his article because it was a state supported medium of communications.[24] The court concluded that it was necessary for the law review to exercise selective editorial control over its contents. The court added that the existence of public funding in no way reduced the authority of the law review's editorial board.

Likewise, in CBS v. DNC, the Supreme Court rejected the plaintiff's claim of a right of access to commercial broadcast stations. The Court ruled that "for better or worse, editing is what editors are for; and editing is selection and choice of material."[25] The Court also recognized the consequences of opening up broadcasters to right of access claims through application of the public forum doctrine:

> Under a constitutionally-commanded and Government supervised right-of-access system . . . the (FCC) would be required to oversee far more of the day-to-day operations of broadcaster's conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.[26]

The pivotal issue involved in determining the existence of a public forum involves examining whether the exercise of editorial authority is

necessary to the continued existence of the medium. In the case of municipal auditoriums which can often accomodate all those who desire to utilize them, there is little reason to allow the hall's supervisors to discriminate among potential users. However, public broadcasters are confronted with a situation where the demand for air time greatly exceeds the time available. Thus, some editorial control must be retained to enable public stations to fulfill their statutory obligation to provide balanced coverage of issues of public importance.

One legal scholar expressed the need for public broadcasting to retain editorial control over its programming:

> Public broadcasting cannot survive an operation performed with as blunt an instrument as the public forum approach . . . which admits of no content control, and therefore no editing and which mandates virtually uncontrollable public access to public broadcasting channels. The end of public broadcasting as a coherent voice would only reduce the quantity, quality and diversity of the total broadcasting offering. The first amendment does not drive us in that direction.[27]

It can be argued that a noncommercial ststion operating with public funds may have a moral, if not statutory, obligation to provide greater public access than commercial broadcasters. Such an action would be consisten with the philosophy of legal scholars such as Thomas Emerson and Zechariah Chafee, regarding the affirmative responsibility of governmental bodies to expand the public discussion of important issues. However, public broadcasters have evinced relatively little enthusiasm for expanding public access to their facilities. James Fellows, president of the National Association of Educational Broadcasters, has argued that commercial stations are no less

obligated to serve the public interest than public licensees. Fred Friendly, former president of CBS News and public television advisor to the Ford Foundation, has pointed out that commercial broadcasters actually receive a larger government grant in the form of their licenses than public stations receive in CPB funding.

Although the courts have supported the need for governmental bodies to possess editorial power, they have retained an interest in how that authority is exercised. In a case somewhat analogous to the Death of a Princess affair, a lower court found the president of Auburn University had acted improperly when he vetoed a student organization's invitation to Rev. William Sloan Coffin to speak on campus. The court determined that Auburn was not required to allocate money for speakers, but "(h)aving allocated the money . . . and having paid other speakers with no questions asked, Auburn may not in this instance, for no constitutionally acceptable reason, withhold the funds . . . as a censorship device."[28] The court noted that the university president had never interfered with the selection of campus speakers before the invitation was extended to Rev. Coffin. In affirming the lower court's ruling, the court of appeals held that the selection of campus speakers "cannot be left to the discretion of the university president on a pick and choose basis." The court ruled the president's action was an unconstitutional prior restraint.

In a second case with implications for public broadcasting, the courts struck down a college president's decision that a campus newspaper would have to submit all issues to a faculty board before it received university funding. The court held that the president's actions

constituted a prior restraint, and added he had exceeded his authority since "(t)he state is not necessarily the unrestrained master of what it creates and fosters."[30] The court added:

> In the very creation of an activity involving media of communication, the state regulates to some degree the form of expression fostered. But the creation of the form does not give birth also to the power to mold its substance . . . Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated . . . it would be inconsistent with the basic assumptions of First Amendment freedom to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate.[31]

A reading of the court decisions cited above, and other relevant case law regarding potential public forums indicates that when the state delegates editorial authority, as in the case of a campus newspaper editor or a public television station manager, it cannot subsequently arbitrarily interfere with the judgments of its agent-editors. In the Death of a Princess case, the vice president of the University of Houston was not normally involved in the chain of editorial decision-making, and thus his actions were held to be improper by the courts.

Preventing state agents who are not typically involved in decision-making from exercising editorial authority is a key element in protecting the integrity and autonomy of officials in charge of state owned communications outlets, such as public broadcast stations. However, ensuring the First Amendment rights of state editor-agents is only a means to achieve the larger goal of protecting the public's right to be informed. While state officials may be proscribed from interfering in program judgments, there remains the possibility of station personnel

making editorial decisions based on political or personal beliefs, rather than on artistic and audience sensitive criteria. Such a situation would clearly abridge the public's First Amendment rights.

Admittedly, it is extremely difficult to delineate the "acceptable" criteria on which to base programming judgments. PBS's friend of the court brief in the Alabama-Death of a Princess lawsuit identified the dilemma:

> The selection of the issues, the manner in which those issues will be dealt with, the participants in the program and the timing of the broadcast are all decisions which cannot be made on the basis of the objective, quantifiable and "non-political" factors the plaintiffs insist state licensees employ. Rather, those decisions involve subjective considerations as to the importance, timeliness, newsworthiness of the issue, the effectiveness of the spokesmen, the appropriate manner of treating the issue and a variety of other intangible factors which do not permit precise determination.[32]

Some observers have attempted to operationally define political motives which might be proscribed as grounds for editorial decision-making. Professor Oscar Chase of New York University Law School defined political decisions as first, ones based on disagreement with a speaker's position, rather than on doubts regarding the quality of the presentation or the likely audience interest in it.[33] The second type of political decisions involves those based on fear of adverse audience reaction as opposed to an objective assessment of audience interest in the presentation. Thus, concludes Professor Chase, if a speaker is boring or difficult to comprehend, a programmer would have the discretion to refuse to provide air time. However, if a speaker is restrained

because the programmer either personally disagrees with the content of the presentation or believes the audience will disagree, the programmer has exceeded his/her authority.

While Professor Chase's position has some attractiveness, it is not without its problems. For example, a program in which a speaker espouses a racist position would likely be offensive to much of the audience. Under Chase's approach, a programmer might be prohibited from banning the program because of the adverse audience reaction. Professor Chase has indicated that in such a situation the key question involves how the material is presented. If the speaker delivers a wild, disjointed diatribe, Professor Chase would agree that a programmer could refuse to broadcast it. However, if a speaker such as Dr. William Shockley delivers a coherent presentation on why blacks are inherently inferior, under Professor Chase's schema a programmer would be obliged to air the program.

Although one may contend that the public interest would be ill served by the presentation of views such as Dr. Shockley's, it can conversely be argued that the presentation of those beliefs is useful in focusing society's attention on the underlying issues involved. Also, the Supreme Court has held that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech . . . may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance on an idea."[34]

The greatest difficulty in any system of evaluating the programming decisions of public broadcasters, is the necessity of drawing the courts or the FCC into the decision-making process. As the Supreme Court stressed in CBS v. DNC, such a result would be undesirable even if it would reduce the programmers' abuse of their editorial authority. Of course, the CBS case involved commercial broadcasters, but the Court's majority opinion did not differentiate between the editorial discretion allowed to commercial and public licensees. The statements of Justices Douglas and Brennan, however, open up the possibility that the Court might take a different view regarding the exercise of editorial authority by public broadcasters.

Indeed, it would seem that in cases such as the KUHT-Princess affair, the courts could legitimately intervene when the editorial authority of public broadcast programmers is usurped by government officials not normally involved in decision-making. But it is much more difficult to justify the intrusion of the courts or the FCC in the programming decisions of public broadcast officials themselves. However, other strategies might be utilized to ensure that public broadcasters do not abuse their program authority.

For example, a citizens' panel might be established by public stations to arbitrate disputes over programming decisions. While the panel would not be involved in the day-to-day scrutiny of a station's program choices, it could be utilized in instances such as the Death of a Princess controversy. The extent of the panel's power would be limited, since practically it would only be able to consider decision

to air programs already produced and offered to a station via PBS or independent producers. Stations officials could still use personnel or political motives in determining the types of programs to be produced at the station itself. However, the citizens' panel could engage in a yearly review of a station's programming to determine whether the licensee was providing balanced coverage of a variety of important public issues. Of course, the FCC under the fairness doctrine supposedly engages in the same type of scrutiny. But whether in response to a specific fairness doctrine complaint or in evaluating a station's license renewal, the Commission's efforts have been generally pro forma. And while a citizens' panel recommendations would not be legally binding, it could utilize pressure from the press and public to compel a public licensee to give serious consideration to its recommendations.

Summary

A compelling argument can be made that public stations licensed to government bodies have a greater obligation than commercial stations under the First Amendment to transcend political and personal biases in making programming decisions. It is also equally important that government officials, having delegated editorial authority to public broadcast programmers, do not attempt to arbitrarily interfere with the programmer's decisions. In the latter case, the courts may be able to provide relief to station officials whose authority is usurped. However, imposing the judgments of the courts or the FCC on all [illegible] a

public station's programming decisions would be antithetical to numerous Supreme Court decisions, which have affirmed the right of all broadcasters to retain broad editorial discretion. Thus, a non-statutory approach must be established in order to encourage public stations to base programming decision on public interest, rather than political considerations. A citizens' panel is one possible solution to the dilemma.

Notes

[1] Hague v. CIO, 307 U.S. 515, 516 (1939).

[2] Police Department of Chicago v. Mosley, 408 U.S. 96 (1972).

[3] R. Allan Horning, "The First Amendment Right to a Public Forum," Duke Law Journal, 1969, pp. 938-939.

[4] CBS v. Democratic National Committee, 412 U.S. 149, 150 (1973).

[5] CBS v. Democratic National Committee, 412 U.S. 143 (1973).

[6] City of New York Municipal Broadcasting System, 43 FCC 2d 169, 197 (1975).

[7] Southeastern Promotions Ltd. v. Conrad, 420 U.S. 555 (1975).

[8] Advocates for the Arts v. Thomson, 532 F.2d 797 (1st Cir. 1976).

[9] Network Project v. Corporation for Public Broadcasting, 4 Med. L. Rptr. 2409 (D.D.C. 1979).

[10] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 1809 (S.D. Tex. 1980).

[11] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 1809 (S.D. Tex. 1980).

[12] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 2285 (S.D. Tex. 1980).

[13] Brief of Public Broadcasting Service as Amicus Curiae, in Barnstone v. Univ. of Houston (S.D. Tex. 1980), p. 9.

[14] Brief of Public Broadcasting Service as Amicus Curiae, in Barnstone v. Univ. of Houston (S.D. Tex. 1980), p. 17.

[15] Brief of Public Broadcasting Service as Amicus Curiae, in Barnstone v. Univ. of Houston (S.D. Tex. 1980), p. 20.

[16] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 2292 (S.D. Tex. 1980).

[17] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 2292 (S.D. Tex. 1980).

[18] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 2293 (S.D. Tex. 1980).

[19] Brief of Public Broadcasting Service as Amicus Curiae, in Barnstone v. Univ. of Houston (S.D. Tex. 1980), pp. 11-12.

[20] Barnstone v. Univ. of Houston, 6 Med. L. Rptr. 2295 (S.D. Tex. 1980).

[21] Brief of Public Broadcasting Service as Amicus Curiae, in Muir v. Alabama Educational Television Commission (5th Cir. 1980).

[22] Hague v. CIO, 307 U.S. 515 (1939).

[23] Kim A. McLane, "Access to State-Owned Communications Media--The Public Forum Doctrine," UCLA Law Review, 26, No. 4 (Apr. 1979), 1444.

[24] Avins v. Rutgers, 385 F.2d 151 (3d Cir. 1967).

[25] CBS v. Democratic National Convention, 412 U.S. 124 (1973).

[26] CBS v. Democratic National Convention, 412 U.S. 126, 127 (1973).

[27] William C. Canby Jr., "The First Amendment and the State as Editor: Implications for Public Broadcasters," Texas Law Review, 52, No. 6 (Aug. 1974), 1165.

[28] Brooks v. Auburn Univ., 296 F.Supp. 198 (M.D. Ala. 1969).

[29] Brooks v. Auburn Univ. 412 F.2d 1172 (1969).

[30] Antonelli v. Hammond, 308 F.Supp. 1337 (D.Mass. 1970).

[31] Antonelli v. Hammond, 308 F.Supp. 1337 (D.Mass. 1970).

[32] Brief of Public Broadcasting Service as Amicus Curiae, in Muir v. Alabama Educational Television Commission (5th Cir. 1980).

[33] Personal interview with Professor Oscar Chase, 11 Mar. 1981.

[34] Terminiello v. City of Chicago, 337 U.S. 4 (1949).